Supreme Court, U.S.
FILED
OCT 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-382

IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

JOSEPH E. ZDARSKY*
GUY J. AGOSTINELLI
KAVINOKY & COOK
Attorneys for Respondents
120 Delaware Avenue
Buffalo, New York 14202
(716) 856-9234

* *Counsel of Record*

Dated: September 30, 1987

Batavia Times Publishing Co.
Batavia, New York (716) 344-2000

Question Presented

Under New York's Tax Law, whereby its motor fuel and sales taxes are to be paid by a distributor in the chain of distribution and then collected from successive purchasers ultimately to be borne by the retail purchaser, can New York compel a Pennsylvania motor fuel distributor to prepay motor fuel and sales taxes in connection with sales of motor fuel to Indians on Indian reservations, where state taxation and regulation of such sales is pre-empted by a comprehensive federal regulatory scheme, the Indian Traders Statutes, 25 U.S.C. §261 *et seq.*, and their implementing regulations, and the Indians themselves are exempt from the payment of such state taxes?

Statement of Parent, Subsidiary and Affiliated Corporations Pursuant to Rule 28.1 of the Supreme Court of the United States

Respondent Herzog Brothers Trucking, Inc. does not have any parent, subsidiary or affiliated corporations.

Listing of Parties Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States

Subsequent to the commencement of this action, respondent Gregory Herzog became deceased. Robert L. Herzog and Mary K. Herzog, as co-administrators of the Estate of Gregory Herzog, deceased, were substituted as parties in place of respondent Gregory Herzog and the caption of the action was deemed amended pursuant to the order of Hon. Lawrence E. Kahn, Justice of the Supreme Court, which was granted and entered on June 9, 1986 in the Supreme Court of the State of New York, Albany County. All other parties are shown in the caption.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Court of Appeals of the State of New York in this case. The opinion of the Court of Appeals does not conflict with any decision of this Court, but merely applies to the facts of this case principles of federal pre-emption established by this Court.

I. Statement of the Case

This declaratory judgment action concerns the imposition by the State of New York of its motor fuel taxes and sales taxes with respect to wholesale sales of motor fuel made by a Pennsylvania distributor to the Seneca Nation of Indians, and its authorized dealers, on Indian reservations located within the State's territorial boundaries.

The underlying facts as found by the Court of Appeals are not in dispute. Respondent Herzog Brothers Trucking, Inc. (hereinafter "Herzog") is a Pennsylvania corporation engaged in wholesale and retail distribution and sales of motor fuels. In June of 1984, Herzog began wholesale distribution of motor fuel to the Seneca Nation of Indians on its Allegany and Cattaraugus reservations in New York. The motor fuel was sold to authorized Indian retail establishments on these reservations. These sales constituted Herzog's only transactions in motor fuel in the State of New York. The Seneca Indians refused to pay Herzog any state taxes on these transactions, believing themselves exempt from state regulation and taxation. In November of 1984, petitioner State Tax Commission began assessing motor fuel taxes and sales taxes against Herzog and its corporate principals. (*See* Opinion of the Court of Appeals reproduced at page A4 of the petition.)[1]

As set forth by the Court of Appeals, prior to June 1, 1985, New York's motor fuel tax was to be collected upon the first sale by a distributor, while the sales tax on motor fuel was to be collected at the time the fuel was sold to the ultimate consumer. *See*, New York Tax Law

[1] Unless otherwise noted, numbers in parenthesis preceded by the letter "A" are references to the pages of the appendix to the petition.

former Articles 12-A and 28, respectively. On June 1, 1985, the Legislature amended Article 28 of the Tax Law to impose the sales tax at the time the motor fuel is imported or first sold. *See*, New York Laws of 1985, Chapter 44, Section 20, adding Tax Law Section 1102. (Opinion of the Court of Appeals, page A4). In its opinion, the Court of Appeals summarized the relevant provisions of the current New York Tax Law as follows:

> Thus, at the present time, articles 12-A and 28 of the Tax Law impose motor fuel and sales taxes upon the importation and sale of motor fuel within the state (*see*, Tax Law §§284, 284-a, 284-c, 1101[b][4][ii], 1102, 1105). The taxes are assessed to, and collected from, the distributor and then included in its wholesale price (*see*, Tax Law §282[1]). Following purchase from the distributor, the retailer includes the tax in its retail price and passes it on to the ultimate consumer. Where the ultimate consumer is an Indian, or otherwise exempt from taxation, the taxes are refunded, or a credit is given (*see*, Tax Law §§289-c, 1139). (Opinion of the Court of Appeals, pages A4-A5).

Respondents brought this action seeking a declaratory judgment that the State of New York is without power to impose its motor fuel taxes and sales taxes on Herzog's wholesale sales to Indians on Indian reservations, and seeking a preliminary and permanent injunction against petitioners.[2] New York's Tax Law expressly provides that such taxes are to be imposed except where their collection is precluded "by the United States Constitution and the laws of the United States enacted pursuant thereto." Tax Law §284(1) (motor fuel tax); §1102(a) (sales tax).

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[2] As noted by petitioners in footnote 3 on page 4 of the petition, motor fuel and sales taxes in excess of $400,000 have been assessed against Herzog for the period through June 30, 1985.

Respondents' application for a preliminary injunction was granted (A23-A26). The petitioners appealed to the Appellate Division of the Supreme Court, which reversed (A15-A22). The majority of the Appellate Division found that respondents failed to demonstrate a likelihood of success on the merits, reasoning that the taxes assessed against respondents were a "minimal burden" permitted by law.[3]

A unanimous Court of Appeals reversed the Appellate Division and held that respondents had established, as a matter of law, a clear likelihood of success on the merits of their challenge to the petitioners' imposition of taxes on their motor fuel transactions with the Seneca Nation of Indians. The Court of Appeals held that the imposition of such taxes upon Herzog and the attempted regulation of Herzog's sales to the Indians were pre-empted by the Indian Trader Statutes, 25 U.S.C. §261, *et seq.* and their implementing regulations. *See Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

[3] The petitioners incorrectly state that the Appellate Division concluded that the New York Tax Law "... did not impose taxes upon either the respondents or the Indian retailers." (Petition, page 5.) The Appellate Division found that taxes in excess of $400,000 had already been assessed against Herzog (A17).

II. Summary of Argument

State taxation and regulation of respondents' wholesale sales to reservation Indians are pre-empted by federal law. *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

Petitioners seek to avoid the impact of the federal pre-emption doctrine by focusing their argument on certain decisions of this Court which recognize that Indian retail vendors in a chain of distribution may be required to collect a state tax from a non-Indian retail customer. *See, California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flat Head Reservation*, 425 U.S. 463 (1976). Petitioners' argue that the cases which permit a state to require an Indian retail vendor to collect a state tax imposed on his non-Indian retail customer also authorize a state to impose a tax on transactions in which an Indian trader sells solely to Indians on Indian reservations. (Petition, pages 7-10).

Petitioners' contention is incorrect. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), this Court held:

> The Indian traders statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange [citation omitted], but no similar intent is evident with respect to sales by Indians to nonmembers of the Tribe. 447 U.S. at 155-156.

Thus, a critical distinction is made between sales by businesses to Indians and sales by Indians to non-Indians. As to the former, the Indian Trader Statutes and regulations pre-empt state taxes, regulations or interference. *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965). As to the latter, the Indian Trader Statutes have no application and a state is free to impose minimal burdens upon an Indian retailer and compel him to collect and remit state taxes from his non-Indian customers. *See e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

Finding that this Court's cases construing the Indian Trader Statutes were dispositive, the Court of Appeals properly held that the petitioners could not apply New York's Tax Law to tax or otherwise regulate Herzog's wholesale sales to Indians on Indian reservations. Implicitly, the Court of Appeals held that New York's Tax Law must be applied by petitioners at the next level of distribution, to wit: sales made by the Indian retailers to non-Indian retail customers.

III. Argument

A. The Court of Appeals correctly applied federal pre-emption principles enunciated by the Supreme Court in holding that petitioners could not apply New York's tax laws to Herzog's sales to Indians.

In *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980), this Court considered a case where a non-resident corporation sold certain farm equipment to an enterprise of an Indian tribe. The state of Arizona sought to impose a transaction privilege tax on the seller corporation. It contended that it had jurisdiction to do so since the seller corporation did not maintain a place of business on the Indian reservation and that a "transaction privilege tax" upon the seller corporation was different than a "sales tax" on the transaction which would be passed on to the Indians. Arizona thus sought to distinguish the decision of this Court in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965). There, it was held that trade with Indians on Indian reservations was governed by the Indian Trader Statutes, 25 U.S.C. §261 *et seq.*, and the detailed federal regulations enacted pursuant thereto, and that such federal law pre-empted state taxes and regulations with respect to such trade. In *Central Machinery*, this Court rejected the argument made by Arizona, and held that the Indian Trader Statutes and their implementing regulations apply to and pre-empted state taxation of a non-resident person who sells goods to Indians on an Indian reservation within a state. The Court also rejected attempts to distinguish *Warren Trading Post* on the ground that the tax being imposed was on the seller corporation and not directly passed on to the Indians. 448 U.S. at 164.

Contrary to petitioners' assertions on page 10 of the petition, this Court's decision in *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980) does not stand merely for the proposition that a "transaction privilege tax" on the privilege of doing business in a particular state is pre-empted by the Indian Trader Statutes. In *Central Machinery*, this Court reaffirmed that the Indian Trader Statutes and regulations are ". . .in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 448 U.S. at 163-164. Indeed, citing *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965), this Court further stated that "there is no room for states to legislate on the subject," and "[u]ntil Congress repeals or amends the Indian trader statutes, however, we must give them a 'sweep as broad as [their] language'." 448 U.S. at 166. Where such pre-emption is found, the prohibition against state burdens on persons trading with Indians is absolute.

Petitioners imply that no such burdens are presented in the instant case by misstating that New York's Tax Law ". . .does not impose taxes upon either the distributor or the tribal enterprise" and "[t]he taxes are assessed only against non-members of the tribe." (Petition, page 10.) However, federal pre-emption does not follow merely from the incidence of the tax, but from the existence of a comprehensive federal statutory and regulatory scheme which applies to such transactions. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), this Court held:

> Of course, the fact that the economic burden of the tax falls on the tribe does not by itself mean that the tax is pre-empted as *Moe v. Salish &*

> *Kootenai Tribes*, 425 U.S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of a comprehensive federal regulatory scheme which like that in *Warren Trading Post Co. v. Arizona Tax Comm'n.*, 380 U.S. 685 (1965), leaves no room for additional burdens sought to be imposed by state law. 448 U.S. at 151 fn. 15.

The Indian Trader Statutes and their regulations provide such a comprehensive federal regulatory scheme. In *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965), this Court held that the purpose of these statutes and regulations was to ensure "that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or regulations promulgated under those Acts." 380 U.S. at 691.

In any event, the Court of Appeals rejected the petitioners' position regarding the assessment of New York's motor fuel and sales taxes by holding that such taxes "are assessed to, and collected from, the distributor and then included in its wholesale price (*see*, Tax Law §282[1])" and ". . .[f]ollowing purchase from the distributor, the retailer includes the tax in his retail price and passes it on to the ultimate consumer." (Opinion of the Court of Appeals, pages A4-A5.) New York's Tax Law thus provides that it is a distributor, such as Herzog, who is to bear the burden of *paying* the motor fuel and sales taxes and seeking collection of such taxes from *its* customers.[4]

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[4] The Petition also contains the following incorrect statement: "As the court below stated, the burden and legal incidence of the tax falls on the non-Indian consumer (A8)." (Petition, page 3.) The Court of Appeals, in its opinion at page A8, was merely summarizing the petitioners' contentions, not the court's decision. Petitioners have already assessed taxes in excess of $400,000 against Herzog. The Court of Appeals held that such application of New York's Tax Law imposed impermissible burdens *upon respondents* that could not be sustained (A11, A14).

Having determined that the petitioners' application of New York's Tax Law imposes burdens upon Herzog's wholesale sales to Indians on Indian reservations, the Court of Appeals correctly concluded as follows:

> The Supreme Court cases construing the Indian trader statutes are dispositive. We determine that Congress has pre-empted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary state tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders (*see, Warren Trading Post Co. v. Arizona Tax Com.*, 380 U.S. 685, 690, *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is pre-empted by the federal trader laws and the Appellate Division erred, as a matter of law, in holding that plaintiffs had not established a "clear likelihood of success on the merits" on their application for a preliminary injunction. (Opinion of the Court of Appeals, page A14.)

The Court of Appeals, in reaching its decision, simply applied well established federal pre-emption principles enunciated by this Court to the particular facts of this case.

B. The *Moe* and *Confederated Tribes* cases do not support the petitioners' position.

Petitioners' contention that the Court of Appeals opinion is in "direct conflict" with *Moe v. Confederated Salish and Kootenai Tribes of the Flat Head Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) is incorrect. There is no such conflict.

At the outset, petitioners incorrectly state that this Court in the *Confederated Tribes* case "rejected out-of-hand the argument that federal Indian law, including the

Indian Trader Statutes, pre-empted the Washington State tax scheme." *See* Petition, page 9.

The *Confederated Tribes* case dealt with the collection of a state tax from a non-Indian retail purchaser. The operators of tribal smoke shops in *Confederated Tribes* were indeed federally licensed Indian traders. This Court held that such retailers could be compelled, notwithstanding the Indian Trader Statutes, to collect a state tax from their non-Indian retail purchasers and remit same to the State. However, this Court in *Confederated Tribes* explained *why* the Indian Trader Statutes did not govern the case before it:

> The Indian traders statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate *businesses selling goods to reservation Indians* for cash or exchange, see *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), *but no similar intent is evident with respect to sales made by Indians to nonmembers of the Tribe.* 447 U.S. at 155-156. (Emphasis supplied.)

Unlike the "Indian traders" in the *Confederated Tribes* case, all of Herzog's wholesale sales are made *to* reservation Indians on Indian reservations and are thus covered by the Indian Trader Statutes. Hence, state regulation of such transactions is pre-empted by federal law. Any subsequent sales made by Indian retailers to non-members of the tribe are not so governed, and the states may impose on the Indian retailers the minimal burden of collecting a state tax from a non-Indian retail purchaser.

Also, neither *Moe* nor *Confederated Tribes* sanction pre-payment of a state tax by an Indian vendor to his wholesale supplier. Contrary to petitioners' assertion on pp. 7-8 of the petition, in *Moe* this Court did not approve the "pre-payment" provisions of the Montana's Tax

Laws but merely held that "the state may require the Indian proprietor simply to add the tax to the sales price and thereby aid the state's collection and enforcement thereof." 425 U.S. at 483. In *Confederated Tribes*, it was held that the Indian retailer could be required to affix tax stamps purchased from the state to individual packages of cigarettes at the time of sale of such cigarettes to non-members of the tribe. 447 U.S. at 159. This requirement was independent from the wholesale transaction between the Indian retailer and his supplier.

Obviously, any requirement that an Indian pay a tax to his supplier would violate the principle that Indians on an Indian reservation are exempt from paying state taxes since states may tax Indians only when Congress has manifested clearly its consent to such taxation. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). *See also, McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

Indeed, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), this Court expressly recognized that the Indian vendors therein were not required to pay state taxes to their supplier:

> Essentially, the [district] court accepted the state's contention that the tax falls upon the first event which may constitutionally be subjected to it. In the case of sales made by non-Indians to non-Indians, this means the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses or distributes the products. Where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. State Tax Comm'n.*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-

> Indian purchaser. Hence, as the district court concluded, the tax falls on that purchaser. We accept this conclusion. 447 U.S. at 142, fn. 9.

Most recently, in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), this Court reaffirmed that, where an Indian vendor in a chain of distribution was untaxable, such Indian vendor could be required to collect state taxes from his non-Indian purchaser and remit same to the state. This Court has never held that an Indian trader, such as Herzog, who only makes sales to Indians, could be burdened to pre-pay a state tax in connection with such transactions. The Court of Appeals was thus manifestly correct in its holding that petitioners could not apply New York's Tax Law to tax or otherwise regulate Herzog's sales to Indians on Indian reservations.

Contrary to the petitioners' assertion that enforcement of New York's Tax Law against Herzog is necessary to "prevent the marketing of the Seneca's tax exemption to non-members of the tribe", *see* Petition, page 11, the holding of the Court of Appeals simply requires the application of New York's Tax Law by the petitioners at the next level of distribution, *i.e.* sales made by Indian retailers to non-Indian retail purchasers. Under New York Tax Law §285, Indian retailers who have received tax-free motor fuel from Herzog may be required to collect and remit the state's motor fuel and sales taxes with respect to any sales thereafter made to non-Indian retail purchasers. New York Tax Law §285 provides as follows:

> If a person, firm, association or corporation shall receive any motor fuel in such form and under such circumstances as shall preclude the collection of such tax from a distributor by reason of the constitution and laws of the United States, and shall thereafter sell any such fuel in any such manner and under such circumstances as shall subject the fuel

> sold to the taxing power of this state, such person, firm, association or corporation shall be considered a distributor with respect to such sale and shall make the same reports, pay the same taxes and be subject to all other provisions of this article relating to distributors.

Thus, the State of New York, consistent with the *Moe*, *Confederated Tribes* and *Chemehuevi* cases, could require the Indian retail vendors who have received tax-free motor fuel from Herzog to collect and remit the State's motor fuel and sales taxes with respect to any sales thereafter made to non-Indian retail purchasers.

Finally, petitioners' reference to this Court's approval in *Confederated Tribes* of the state's seizure of contraband cigarettes as support for New York's taxation of wholesale sales to Indians is misplaced. Such seizures were approved, as part of state regulation of sales by Indian retailers to non-Indian retailer purchasers, because the Indians in that case ". . . refused to fulfill collection and remittance obligations [upon them] which the State has validly imposed." 447 U.S. at 161-162. This Court expressly observed in that context that ". . . sales by wholesalers to the tribal businesses are concededly exempt from state taxation," and that ". . . cigarettes in transit [to the tribal enterprises] are as yet exempt from state taxation." 447 U.S. at 161. This Court did not authorize any burdens upon a wholesale trader, such as Herzog.

The petitioners have never sought to apply New York's Tax Law to the Seneca Indians' retail sales to non-Indian purchasers. This case deals only with wholesale sales made by Herzog to the Seneca Indians, transactions clearly within the Indian Traders Statutes and their implementing regulations.

IV. Conclusion

There is no special importance attached to the Court of Appeals decision which warrants certiorari. The Court of Appeals simply applied the decisions of this Court to the case before it. The petition for certiorari should thus be denied.

Dated: Buffalo, New York
September 30, 1987

Respectfully submitted,

KAVINOKY & COOK
Attorneys for Respondents
120 Delaware Avenue
Buffalo, New York 14202
(716) 856-9234

Of Counsel:

JOSEPH E. ZDARSKY*
GUY J. AGOSTINELLI

* *Counsel of Record*